UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---X

JING FANG LUO and SHUANG QIU HUANG, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

PANARIUM KISSENA INC. d/b/a FAY DA BAKERY, PANARIUM INC. d/b/a FAY DA BAKERY, BOULANGERIE DE FAY DA INC. d/b/a FAY DA BAKERY, PATISSERIE DE FAY DA, LLC d/b/a FAY DA BAKERY, LE PETIT PAIN INC. d/b/a FAY DA BAKERY, BRAVURA SKY VIEW CORP. d/b/a FAY DA BAKERY, LA PAN MIETTE INC. d/b/a FAY DA BAKERY, FAY DA (QUEENS) CORP. d/b/a FAY DA BAKERY, FAY DA MOTT ST., INC. d/b/a FAY DA BAKERY, FEI DAR, INC. d/b/a FAY DA BAKERY, LE PAIN SUR LE MONDE INC. d/b/a FAY DA BAKERY, BRAVURA LLC d/b/a FAY DA BAKERY, CHI WAI CORP. d/b/a FAY DA BAKERY, PHADARIAN CORP. d/b/a FAY DA BAKERY, FAY DA MAIN STREET CORP. d/b/a FAY DA BAKERY, TORTA DI FAY DA d/b/a FAY DA BAKERY, BRAVURA PATISSERIE d/b/a FAY DA BAKERY, NICPAT CAFÉ INC. d/b/a FAY DA BAKERY, FAY DA MANUFACTURING CORP., FAY DA HOLDING CORP. d/b/a FAY DA BAKERY, FAY DA HOLDING GEN 2 CORP. d/b/a FAY DA BAKERY, HAN CHIEH CHOU, and KELLEN CHOW,

Defendants.

---X

REPORT AND RECOMMENDATION

15-CV-3642 (WFK) (ST)

TISCIONE, United States Magistrate Judge:

Plaintiffs Jing Fang Luo and Shuang Qiu Huang are former employees of a Cantonese bakery chain doing business as Fay Da Bakery. *See* Dkt. No. 36 ("Am. Compl." or the "Amended Complaint"), ¶¶ 13-16, 42. Plaintiffs brought suit on June 23, 2015, against numerous corporations operating as individual locations of Fay Da Bakery, as well as several other entities in the Fay Da Bakery corporate family and two individuals who purportedly own or manage the corporate entities. *See id.* ¶¶ 17-61.

Plaintiffs claim, *inter alia*, that they were not paid the minimum wage because Defendants took unlawful meal credits, in violation of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (the "FLSA"), and the New York Labor Law (the "NYLL"), and that they were not compensated for uniform maintenance and not repaid for uniform purchases in violation of the NYLL. *See* Am. Compl. ¶¶ 114-16, 124-46, 152-61. Plaintiffs have moved for an Order (1) conditionally certifying an FLSA collective action of similarly situated employees; (2) approving the proposed notice and consent forms for mailing to putative opt-in plaintiffs; (3) requiring Defendants to post the notice and consent forms in their places of business; and (4) permitting all similarly situated individuals 90 days to opt into this case. *See* Dkt. No. 47; Dkt. No. 48. For the reasons below, I respectfully recommend that the motion be granted in part and denied in part.

I. BACKGROUND

Ms. Luo worked for defendant Panarium Inc., located at 41-60 Main Street in Flushing ("Panarium Flushing"), as a cashier from approximately November 27, 2011 to June 30, 2012; for defendant Boulangerie De Fay Da Inc., located at 136-18 39th Avenue in Flushing ("Boulangerie"), as a cashier from approximately July 1, 2012 to August 31, 2012; and for defendant Panarium Kissena Inc., located at 46-15 Kissena Boulevard in Flushing ("Panarium Kissena"), as a baker from approximately September 1, 2012 to April 29, 2013. *See* Am. Compl. ¶¶ 13-14, 94-104; Dkt. No. 48-2 ("Luo Aff."), ¶¶ 3, 4, 6; Dkt. No. 48-9.[1] Ms. Huang worked for

[1] One paragraph of the Amended Complaint indicates that Ms. Luo worked for Boulangerie as a baker from approximately September 2, 2013 to April 29, 2013 (*see* Am. Compl. ¶ 15), but Ms. Luo's affidavit and pay stubs indicate that her employer during that time

Panarium Flushing as a cashier and a baker from approximately April 15, 2012 to May 11, 2013. *See* Am. Compl. ¶ 16, 105; Dkt. No. 48-3 ("Huang Aff."), ¶¶ 3, 5.[2] Panarium Flushing, Boulangerie, and Panarium Kissena are three New York corporations each operating a Cantonese bakery doing business as Fay Da Bakery. *See* Am. Compl. ¶¶ 17-19, 42.

Including the three locations where Panarium Flushing, Boulangerie, and Panarium Kissena operate individual Fay Da Bakeries, there are ten active Fay Da Bakery locations in New York, plus one active Fay Da Bakery location in Connecticut. *Id.* ¶ 45; Dkt. No. 37 (the "Answer"), ¶ 16. There are also several former locations of Fay Da Bakery in New York, New Jersey, and Connecticut. *See* Am. Compl. ¶ 46; Answer ¶ 16. The corporations that own and operate Fay Da Bakery locations operate on a centralized basis. *See* Am. Compl. ¶¶ 42, 43; Answer ¶¶ 14, 15. The two individual defendants are a principal, officer, and director of the Fay Da Bakery corporations, and an officer of the Fay Da Bakery corporations, respectively. *See* Am. Compl. ¶¶ 53-61; Answer ¶¶ 22, 23.

Throughout the course of their employment, Plaintiffs' pay was reduced for meals purportedly provided by their employer. *See* Dkt. Nos. 48-9, 48-10, 48-11. This operated to bring Plaintiffs' actual take-home wages below the minimum wage. *See* Am. Compl. ¶¶ 64, 101, 104, 109; Luo Aff. ¶ 8; Huang Aff. ¶ 6. Plaintiffs allege that while their employers took this meal credit, their employers (i) failed to record the actual cost accrued in connection with the meal

---

period was in fact Panarium Kissena. *See* Luo Aff. ¶ 6; Dkt. No. 48-9. Similarly, the Amended Complaint also indicates in two paragraphs that Ms. Luo was a "server" at Panarium Flushing and Boulangerie (*see* Am. Compl. ¶¶ 94, 97), but Ms. Luo's affidavit indicates otherwise. *See* Luo Aff. ¶¶ 3, 4.

[2] Like with Ms. Luo, the Amended Complaint indicates in one paragraph that Ms. Huang was a "server" (*see* Am. Compl. ¶ 105), but Ms. Huang's affidavit indicates otherwise. *See* Huang Aff. ¶¶ 3, 5.

credit (*see* Am. Compl. ¶¶ 73-76) and (ii) provided only bread and coffee for the meals (*see id.* ¶¶ 73, 143).

While they worked as employees of Fay Da Bakery, Plaintiffs were required to wear a clean uniform, including a green dress shirt, a green bandana, and an apron with a Fay Da Bakery logo. *See* Am. Compl. ¶¶ 77-81; Answer ¶ 28; Luo Aff. ¶ 9; Huang Aff. ¶ 7. Plaintiffs allege that they and other full-time employees were only provided with two uniforms and that their employers did not clean, launder, or provide maintenance services for the uniforms. *See* Am. Compl. ¶¶ 82-86; Luo Aff. ¶¶ 10-12; Huang Aff. ¶¶ 8-10.

Plaintiffs also allege that their employers required them "to purchase required uniforms by deducting its cost of $45 from their paychecks, and never reimbursing them at a time that was no later than the next pay day." *See* Am. Compl. ¶ 72. This allegation is denied by Defendants (*see* Answer ¶ 27), but relevant pay statements show a $45 deposit was taken (*see* Dkt. No. 54-1 at 15-16, 26). This "security deposit" appears to have been taken from Ms. Huang on April 28, 2012. *See* Dkt. No. 54-1 at 26; Dkt. No. 48-10 at 3. There is no indication that Ms. Huang was reimbursed for these costs in subsequent pay statements, let alone the next payday. *Cf.* Dkt. No. 48-10 at 5 (showing that a different employee received a $45 reimbursement).

Despite only working at a combined three locations between them, Plaintiffs purport to bring this collective action on behalf of all similarly situated employees working for 21 different entities at approximately 19 locations. In their two affidavits combined, Ms. Luo and Ms. Huang identify each other, three other cashiers,[3] and one other baker who were allegedly subject to the same conditions of employment. *See* Luo Aff. ¶¶ 14-25; Huang Aff. ¶¶ 12-16. According to Ms.

---

[3] Ms. Luo's affidavit refers to a cashier named "Yan Yang" and Ms. Huang's affidavit to a cashier named "Yang Yan." *See* Luo Aff. ¶¶ 21-22; Huang Aff. ¶¶ 15-16. The Court assumes that these refer to the same person.

Luo, that one baker was employed at several different locations as "a substitute baker who worked rotating at all Fay Da Bakery stores in Queens to substitute for bakers who [were] off." *See* Luo Aff. ¶¶ 24, 25. However, there is no indication as to where the cashiers (besides Plaintiffs) worked.

Following Defendants' Answer, Plaintiffs moved to certify an FLSA collective action on June 20, 2016. *See* Dkt. Nos. 47, 48, 49 ("Pl. Br."). Defendants opposed the motion (*see* Dkt. No. 50 ("Def. Opp. Br.")) and Plaintiffs filed a reply in further support of the motion (*see* Dkt. No. 51 ("Pl. Reply Br.")). The Honorable William F. Kuntz II referred the motion to me for a report and recommendation on July 6, 2016. On July 7, 2016, I deferred ruling on the motion and directed the parties to conduct limited additional discovery on issues pertaining to certification. *See* Dkt. No. 53. Following that discovery, Plaintiffs filed a supplemental brief in support of the motion on August 22, 2016 (*see* Dkt. No. 54 ("Pl. Supp. Br.")), Defendants filed a supplemental opposition brief on September 22, 2016 (*see* Dkt. No. 55 ("Def. Supp. Opp. Br.")), and Plaintiffs filed a supplemental reply brief on September 30, 2016 (*see* Dkt. No. 56 ("Pl. Supp. Reply Br.")). Based upon my review of the Amended Complaint, the six briefs concerning the instant motion, and all other evidence and filings before me, I respectfully recommend that the motion for conditional certification be granted in part and denied in part.

II. LEGAL STANDARDS

A. Meal Credit

The FLSA provides that an employee's wage "includes the reasonable cost . . . to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." 29 U.S.C. § 203(m). The relevant regulations provide that such a meal credit may only be taken if it complies with federal and state law. *See* 29 C.F.R. § 531.31 ("The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where 'customarily' furnished to the employee. . . . Facilities furnished in violation of any Federal, State, or local law, ordinance, or prohibition will not be considered facilities 'customarily' furnished."). Thus, an employer may deduct money from an employee's wage in the amount of a meal credit's "reasonable cost," but the meal credit may not exceed the actual cost of the meal (*see* 29 C.F.R. § 531.3(a)) and may not exceed $2.50 per meal (*see* 12 N.Y.C.R.R. § 146-1.9), among other restrictions.

Under New York law, employer-provided meals must also consist of "adequate portions of a variety of wholesome, nutritious foods," including fruits or vegetables and eggs, meat, fish, poultry, dairy, or legumes. *Id.* § 146-3.7. Finally, an employer must state on the employee's pay stub the amount of the meal credit in order to apply the credit. *Id.* § 146-2.3; *see Nicholson v. Twelfth St. Corp.*, 2010 WL 1780957, at *3 (S.D.N.Y. May 4, 2010) ("By law, an employer may claim a meal credit if it is properly documented."); *see also Hernandez v. JRPAC Inc.*, 2016 WL 3248493, at *26 (S.D.N.Y. June 9, 2016) ("'[T]he employer must retain records documenting the out-of-pocket costs that it incurred'" in connection with a meal credit) (citation omitted).

B. Uniform Maintenance

Federal law requires an employer to compensate employees for the purchase and maintenance of required uniforms only when such expenditures would reduce the employees' wages below minimum wage. *See Salinas v. Starjem Restaurant Corp.*, 123 F. Supp. 3d 442, 475 (S.D.N.Y. 2015). Under both New York and federal law, a uniform must be more than ordinary or basic street clothes. *See id.* (concluding that "ties and shirts" were uniforms because the restaurant where the employees worked "does not permit variation in these articles of clothing"); *cf. Allende v. PS Brother Gourmet, Inc.*, 2013 WL 11327098, at *4-5 (S.D.N.Y. Feb. 1, 2013).

C. Conditional Certification

Under the FLSA, an employee may sue on behalf of herself and other employees who are "similarly situated." 29 U.S.C. § 216(b). Those "similarly situated" employees may opt-in to a collective action brought under the FLSA, and therefore become plaintiffs, by filing a written consent form with the court. *Varghese v. JP Morgan Chase & Co.*, 2016 WL 4718413, at *5 (S.D.N.Y. Sept. 9, 2016); *see* 29 U.S.C. § 216(b).

The conditional certification of an FLSA collective action is a discretionary exercise of the Court's authority; it is useful as a case management tool, facilitating the dissemination of notice to potential class members. *Myers v. Hertz Corp.*, 624 F.3d 537, 555 n.10 (2d Cir. 2010) (quoting *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 169, 174 (1989)). Because it is discretionary, a motion for conditional certification involves a "far more lenient" standard than a motion for class certification under Rule 23 of the Federal Rules of Civil Procedure. *Feng v. Soy Sauce LLC*, 2016 WL 1070813, at *2 (E.D.N.Y. Mar. 14, 2016).

Courts within the Second Circuit apply a two-step process to determine whether an action should be certified as an FLSA collective action. *Myers*, 624 F.3d at 554-55. In the first step, the Court will analyze the pleadings, affidavits, and declarations to determine whether the plaintiffs and potential opt-in plaintiffs are sufficiently "similarly situated" to issue notice and allow the case to proceed as a collective action through discovery. *Id.* at 555.

The first step requires only a "modest factual showing" that plaintiffs and potential opt-in plaintiffs "together were victims of a common policy or plan that violated the law." *Id.* (internal quotation marks and citations omitted). The standard of proof is low "because the purpose of this first stage is merely to determine *whether* 'similarly situated' plaintiffs do in fact exist." *Id.* (emphasis in original). Participants in a potential collective action need not have held identical jobs or been subject to identical treatment; rather, conditional certification is appropriate where all putative class members are employees of the same enterprise and they allege the same types of FLSA violations. *Lin v. Benihana Nat'l Corp.*, 275 F.R.D. 165, 173 (S.D.N.Y. 2011).

Nonetheless, this "modest factual showing cannot be satisfied simply by unsupported assertions." *Myers*, 624 F.3d at 555 (internal quotation marks and citation omitted); *see also Bittencourt v. Ferrara Bakery & Cafe Inc.*, 310 F.R.D. 106, 111-12 (S.D.N.Y. 2015) (at the first step, the court does not "resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations. However, the evidence must be sufficient to demonstrate that [current] and potential plaintiffs together were victims of a common policy or plan that violated the law.") (internal quotation marks and citations omitted). Still, for conditional certification purposes, "the Court [should] draw all inferences in favor of the Plaintiff[s]." *See Jenkins v. TJX Cos. Inc.*, 853 F. Supp. 2d 317, 322 (E.D.N.Y. 2012).

If a court finds that there are potential opt-in plaintiffs who are "similarly situated," then it has "broad discretion to craft appropriate notices that effectuate the overarching policies of the collective suit provisions and provide employees with accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Hernandez v. Immortal Rise, Inc.*, 2012 WL 4369746, at *6 (E.D.N.Y. Sept. 24, 2012) (internal quotation marks and citations omitted). However, "[t]o bring state-law claims on behalf of others against Defendants, Plaintiff[s] must seek class certification pursuant to Rule 23" of the Federal Rules of Civil Procedure. *Feng*, 2016 WL 1070813, at *4 (citation omitted).

At the second stage, the Court will, on a fuller record, determine whether the actual opt-in plaintiffs are in fact "similarly situated" to the named plaintiffs. *Myers*, 624 F.3d at 555. If the record reveals that the opt-in plaintiffs are not, then the Court may decertify the collective action and the opt-in plaintiffs' claims could be dismissed without prejudice. *Id.*

III. ANALYSIS

Plaintiffs seek to form a collective composed of all current and former employees employed as non-exempt and non-managerial employees by any of the defendants in this case. *See* Dkt. No. 48-4 (the "Notice of Pendency" or "Notice") at 2. According to the proposed Notice of Pendency, any employee who worked at any location of Fay Da Bakery since June 23, 2012 may join the collective action. *Id.* at 3. Plaintiffs' collective action claims are to recover unpaid wages due to purportedly unlawful meal deductions and due to unlawful uniform maintenance and purchase policies. *See id.*

A. Conditional Certification

As discussed above, the instant motion concerns only the first step in the process of certification as an FLSA action. At this stage, Plaintiffs' burden is "minimal," and they need only make a "modest factual showing sufficient to demonstrate that [they] and potential [opt-in] plaintiffs together were victims of a common policy or plan that violated the law." *Feng*, 2016 WL 1070813, at *2 (internal quotation marks and citations omitted).[4] Defendants oppose the motion for conditional certification on the grounds that Plaintiffs and other employees are not "similarly situated" and have not been subjected to a common policy that violates the law. *See* Def. Opp. Br. at 2-13; Def. Supp. Opp. Br. at 2-6.

---

[4] The parties raise an issue about the depth of analysis that the Court should undertake here. *See* Pl. Br. at 7-9; Def. Opp. Br. at 2-8; Pl. Reply Br. at 2-4; Pl. Supp. Br. at 3-4; Def. Supp. Opp. Br. at 2-4; Pl. Supp. Reply Br. at 2-4. Defendants have argued that, as in the Southern District's recent decision in *Korenblum v. Citigroup, Inc.*, 2016 WL 3945692 (S.D.N.Y. July 19, 2016), a "modest plus" standard of review should apply here. *See* Def. Supp. Opp. Br. at 2-3. I decline to do so, noting that: (i) as a practical matter, the "modest plus" standard applied in *Korenblum* is only marginally different, if at all, from the typical "modest" standard (*see Korenblum*, 2016 WL 3945692, at *4 (emphasizing that "the Court still will not decide the ultimate merits of the case or issues better suited for a decertification motion" and that "the Court

1. Unlawful Policy

Plaintiffs allege that Defendants had a policy of taking unlawful meal credit deductions from employees' wages and a policy of failing to compensate employees for uniform maintenance and purchases. *See* Pl. Br. at 8-9; Pl. Supp. Br. at 2, 7-8. Defendants dispute the premise that there in fact existed an unlawful policy at all, as would be required for conditional certification. *See Myers*, 624 F.3d at 555. Specifically, Defendants argue that "there was no overall policy at Defendants that can be viewed in any way as unlawful." Def. Supp. Opp. Br. at 1; *see id.* at 5 ("Presumably, Plaintiffs are arguing that because some of the Defendants' locations had a lawful policy in place for some period of time that this is enough to come under the 'common plan' umbrella."); *see also* Def. Opp. Br. at 4, 11; Def. Supp. Opp. Br. at 1, 4-5.

Defendants' argument misconstrues the Court's analysis at this point in the litigation. "At this conditional certification stage, the focus of the inquiry is not on whether there has been an actual violation of law but rather on whether the proposed plaintiffs are similarly situated under 29 U.S.C. § 216(b) with respect to their allegations that the law has been violated." *Bijoux v. Amerigroup N.Y., LLC*, 2015 WL 4505835, at *5 (E.D.N.Y. July 23, 2015) (internal quotation

draws no negative inferences of any sort where evidence is lacking")); (ii) it is apparent that hardly any additional evidence has been gathered in this case since the Court ordered additional limited discovery on certification issues (*see* Dkt. No. 53); and (iii) *Korenblum* largely relies on an out-of-Circuit case and has not been followed or cited for its "modest plus" standard to date. In any event, were the "modest plus" standard to apply in this case, I would conclude that Plaintiffs have "advanced the ball down the field" and therefore met their burden of establishing that there are similarly situated employees at the three Fay Da Bakery locations at which Ms. Luo and Ms. Huang worked. *See Korenblum*, 2016 WL 3945692, at *4.

marks and citations omitted), *adopted by*, 2015 WL 5444944 (E.D.N.Y. Sept. 15, 2015). Such an inquiry does not require the Court to "resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations." *Ahmed v. T.J. Maxx Corp.*, 2015 WL 2189959, at *3 (E.D.N.Y. May, 11, 2015) (internal quotation marks and citation omitted); *see Valerio v. RNC Indus., LLC*, 314 F.R.D. 61, 69 (E.D.N.Y. 2016) (citing cases and declining to analyze defendants' evidence because "[t]o do so would require the Court to engage in a merits inquiry which is inappropriate at the preliminary certification stage.").

Here, for purposes of conditional certification only, Plaintiffs established an "unlawful policy" whereby Defendants violated the FLSA by taking unlawful meal credit deductions from employees' wages and pushed employees' wages below the minimum wage by failing to compensate them for uniform maintenance and purchases. Both Ms. Luo and Ms. Huang allege that they worked at least 40 hours per week at an hourly rate of $7.25,[5] that Defendants took a meal credit of $2.50 for each day that each Plaintiff worked, and that neither Ms. Luo nor Ms. Huang was compensated for uniform maintenance or repaid for uniform purchases. *See* Am. Compl. ¶¶ 94-109; Luo Aff. ¶¶ 3-13; Huang Aff. ¶¶ 3-11; *see also* Dkt. Nos. 48-9, 48-10, 48-11.

With regard to the meal credits, Plaintiffs specifically allege that Defendants (i) failed to record the actual cost accrued, if any, in connection with the meal credits (*see* Am. Compl. ¶¶ 73-76) and (ii) provided only bread and coffee for the meals, which are insufficiently nutritious to be eligible for a meal credit (*see id.* ¶¶ 73, 143; Pl. Reply Br. at 5). The federal regulation provides that a meal credit may only be taken if it complies with federal and state law. *See* 29

---

[5] During the period of Ms. Luo's and Ms. Huang's employment with Defendants, the minimum hourly wage that they were required to receive under the FLSA was $7.25. *See* 29 U.S.C. § 206(a)(1). The New York minimum wage rate was also $7.25 per hour during the same period. 12 N.Y.C.R.R. § 146-1.2.

C.F.R. § 531.31. Thus, any violation of federal *or* New York law relating to meal credits would suffice to establish an FLSA violation for the purposes of conditional certification.

In this case, Plaintiffs have alleged that Defendants failed to record the actual cost of meals for which Defendants took a meal credit. *See* Am. Compl. ¶¶ 73-76. In fact, while the pay stubs and pay statements of Ms. Luo and Ms. Huang indicate that a meal credit was consistently taken (*see* Dkt. Nos. 48-9, 48-10, 48-11), the records presented to the Court do not explicitly state how many meals the total meal credit covers or what the actual or reasonable cost of each meal is. *See JRPAC*, 2016 WL 3248493, at *26 (requiring "records documenting the out-of-pocket costs" incurred by employer).[6]

Moreover, Plaintiffs have explicitly alleged that Defendants violated New York law (and, therefore, the applicable federal regulation) by failing to provide meals with "adequate portions of a variety of wholesome, nutritious foods" (*see* 12 N.Y.C.R.R. § 146-3.7), including fruits or vegetables and eggs, meat, fish, poultry, dairy, or legumes. *See* Am. Compl. ¶ 143 ("The Defendants only offered coffee and bread as a meal to their employees, which is not a meal as defined in the NYCRR."); *see also* Pl. Reply Br. at 5. For purposes of conditional certification, these allegations sufficiently establish an "unlawful policy" under the FLSA. *See Lin*, 275 F.R.D. at 171 n.1 (if allegations including failure to record the actual cost accrued of a meal credit and insufficiently nutritious meals had been pleaded in the complaint, then meal credit violations would have been "ripe for [conditional] certification" as a collective action).

---

[6] Based on my review of the record, it appears that Ms. Luo and Ms. Huang consistently had a $2.50 meal credit applied to between 13 and 15 meals per pay period. *See* Dkt. Nos. 48-9, 48-10, 48-11. However, there is no evidence in the record indicating the actual or reasonable costs of those meals; even Defendants' interrogatory responses merely state that for "locations [where] a meal credit was taken, employees could eat anything in the store without restriction" (*see* Dkt. No. 54-1 at 7) without providing information about the cost.

With regard to uniform maintenance, Plaintiffs specifically allege that Defendants (i) required employees to pay a “security deposit” for uniforms, including an apron with the Fay Da Bakery logo, for which employees were not reimbursed and (ii) provided only two uniforms to full-time employees, yet provided no maintenance service for employees’ uniforms, meaning that employees’ wages fell below the minimum wage. *See* Am. Compl. ¶¶ 72, 82-93; Pl. Reply Br. at 4-5. Plaintiffs and other employees earned the minimum wage (*see* Dkt. No. 48-10), so the allegations relating to a security deposit (*see* Am. Compl. ¶¶ 72, 154; Dkt. No. 54-1 at 15) and lack of maintenance service for the uniform (*see* Am. Compl. ¶¶ 82, 89; Luo Aff. ¶ 10; Huang Aff. ¶ 8) suffice to establish an “unlawful policy” for the limited purposes of FLSA conditional certification. *See Salinas*, 123 F. Supp. 3d at 475.

Accordingly, the Court finds that Plaintiffs have made a sufficient showing that Defendants engaged in an unlawful policy for the purposes of conditional certification. The Court now turns to the more central question of whether the Plaintiffs and potential opt-in plaintiffs are “similarly situated” with regard to this policy. *See Bijoux*, 2015 WL 4505835, at *5 (whether an unlawful policy or practice exists “takes a back seat to the paramount issue of whether the plaintiffs are similarly situated as to their allegations concerning the allegedly unlawful practices”).

2. Similarly Situated

The “similarly situated” requirement imposes only “a low standard of proof because the purpose of this first stage is merely to determine *whether* ‘similarly situated’ plaintiffs do in fact exist.” *Myers*, 624 F.3d at 555 (emphasis in original). To ascertain whether plaintiffs are similarly situated, district courts typically examine whether “[plaintiffs] and other employees have similar positions, job requirements, pay provisions, and the like; there must be an identifiable factual nexus which binds [plaintiffs] and potential class members together as victims of a particular practice." *Juarez v. 449 Restaurant*, *Inc.*, 29 F. Supp. 3d 363, 369 (S.D.N.Y. 2014) (internal quotation marks and citations omitted).

Plaintiffs' proposed collective comprises all current and former non-exempt, non-managerial employees of any of Defendants (*i.e.*, at any Fay Day Bakery location) since June 23, 2012. *See* Notice at 2, 3. In support of this proposed collective, Plaintiffs rely on allegations in the Amended Complaint, the admissions in the Answer, Ms. Luo's sworn affidavit, Ms. Huang's sworn affidavit, and pay stub and pay statement records filed with the instant motion.[7] Based on my review of the record, Plaintiffs' basis for claiming that the employees of all Fay Da Bakery locations are "similarly situated" is two-fold: first, the corporate defendants are a single common employer, under the control of the individual defendants, for FLSA purposes; and second, that employees at several Fay Da Bakery locations in Queens were subject to policies relating to meal credits, uniform maintenance, and uniform purchases.

As to the first part, there is no doubt that Defendants here are a "single employer" for the instant purposes. *See Marin v. Apple-Metro, Inc.*, 2014 WL 11035376, at *4 (E.D.N.Y. July 29, 2014), at *5 (analyzing totality of circumstances to determine whether there was "(1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control") (internal quotation marks and citations omitted), *aff'd*, 2014 WL 7271591 (E.D.N.Y. Dec. 18, 2014); *see also Lujan v. Cabana Mgmt.*,

---

[7] Defendants' responses to Plaintiffs' interrogatories and document requests are largely inscrutable. *See, e.g.*, Dkt. No. 54-1 at 5 ("Interrogatory No. 1: Identify each location, that was owned or operated by the Defendants, that had a meal deduction policy for employees put in place. If any locations did not have a meal deduction policy in place please indicate those locations." . . . "[Response:] None. Prior to November 10, 2014, some of the locations took a meal credit."). Since these responses are unclear, the Court is unable to decipher their meaning and will instead rely on the other documents identified above.

Inc., 2011 WL 317984, at *6 ("While this Court does not prejudge defendants' status as an employer under the [FLSA], it finds that, in light of the aforesaid evidentiary showing, this is, at a minimum, a 'contested area of fact requiring discovery' and not a basis for denying conditional certification.") (citation omitted). Plaintiffs allege, and Defendants concede, that defendant Fay Da Holding Corp. is the sole management company for all "active retail locations" and that defendant Fay Da Holding Gen 2 Corp. "manages Fay Da Bakery stores in each of its active locations." *See* Am. Compl. ¶¶ 38, 40; Answer ¶ 12. Furthermore, the different Fay Da Bakery corporations concededly "operate on a centralized basis." Answer ¶ 15; *see* Am. Compl. ¶ 43.

Moreover, Plaintiffs allege, and Defendants concede, additional indicia that the corporate defendants are a single common employer: there is a single website for all locations of Fay Da Bakery; there are consistent appearances of the physical stores, bakery products sold, and employee uniforms; and there is one centralized location handling payroll activities. *See* Am. Compl. ¶¶ 47-52; Answer ¶¶ 17, 18. In addition, the allegations and evidence indicate that employees are transferred between different Fay Da Bakery locations. *See* Am. Compl. ¶ 51; Answer ¶ 18; Luo Aff. ¶¶ 3, 4, 6, 24, 25. Finally, one of the individual defendants is a principal, officer, and director of the corporate defendants, and the other individual defendant is an officer of the corporate defendants who "participates in the day-to-day operations of the [corporate defendants]." *See* Am. Compl. ¶¶ 54, 57, 58; Answer ¶¶ 20, 22, 23. Therefore, Defendants are a single employer for purposes of the instant motion. *See Marin*, 2014 WL 11035376, at *5-7 (concluding that, in light of evidence of similar practices and training in all New York metropolitan area locations, "at this stage of the litigation, there is sufficient indicia of commonality and centralized operations to warrant a finding that [defendant] is a single employer"); *Mendoza v. Ashiya Sushi 5, Inc.*, 2013 WL 5211839, at *5 (S.D.N.Y. Sept. 16,

2013) (conditionally certifying collective action of employees at New York City locations of restaurant printed on business card used by manager of one location); *see also Lamb v. Singh Hospitality Grp., Inc.*, 2013 WL 5502844, at *4 (E.D.N.Y. Sept. 30, 2013) ("Plaintiffs have demonstrated some interrelation of operations and alleged some common management among all of Defendants' restaurants. . . . Plaintiffs have demonstrated issues of fact . . . . [that] should be determined following discovery, at the second stage of FLSA collective action certification, rather than at this preliminary stage.") (citations omitted).

However, that is not the end of the inquiry. *See Nabi v. Hudson Grp. (HG) Retail, LLC*, 310 F.R.D. 119, 124 (S.D.N.Y. 2015) ("While evidence that the various Hudson locations operated as part of a 'single enterprise' is not irrelevant, it is also not sufficient to establish that the Covered Employees are 'similarly situated' under the FLSA.") (citation omitted); *Hamadou v. Hess Corp.*, 915 F. Supp. 2d 651, 662 (S.D.N.Y. 2013) ("With respect to both statewide certification and certification across a smaller territory, courts consider whether the plaintiffs have made an adequate factual showing to support an inference that such a uniform policy or practice exists, and whether the locations share common ownership or management.") (citations omitted). Here, Ms. Luo and Ms. Huang worked at a combined three Fay Da Bakery locations, all in Queens. *See* Luo Aff. ¶¶ 3, 4, 6; Huang Aff. ¶¶ 3, 5. Though Ms. Luo and Ms. Huang identify several other employees who they say were subject to the same conditions of employment (*see* Luo Aff. ¶¶ 15-25; Huang Aff. ¶¶ 13-16), Plaintiffs identify the location of employment for only one other employee, a baker named Lu Yang. *See* Luo Aff. ¶¶ 23-25.[8]

[8] Hearsay statements are permitted at this stage. *See, e.g.*, *Moore v. Eagle Sanitation, Inc.*, 276 F.R.D. 54, 59 (E.D.N.Y. 2011) ("[C]ourts in this Circuit 'regularly rely on [hearsay] evidence to determine the propriety of sending a collective action notice.'") (citations omitted); *Fasanelli v. Heartland Brewery, Inc.*, 516 F. Supp. 2d 317, 321-322 (S.D.N.Y. 2007) (use of hearsay statements permitted because "the initial class certification determination must be made

The description of Mr. Yang's locations of employment is of limited value. *See* Luo Aff. ¶ 24 ("LU YANG was a baker at the Fay Da Bakery who worked at, all Fay Da Bakeries, at Forest Hill, Queens Hill and 39th Avenue Fay Da Bakery."). There are indeed Fay Da Bakery locations in Forest Hills and on 39th Avenue in Flushing, but "Queens Hill" does not exist. Moreover, as no time period of employment or further specific information is provided for Mr. Yang, even the statement that Mr. Yang "rotat[ed] at all Fay Da Bakery stores in Queens" (*id.* ¶ 25) is not particularly probative, considering that the Amended Complaint identifies nine Queens locations that are active or inactive. *See* Am. Compl. ¶¶ 45-46.

Even drawing all inferences from the allegations, documentary evidence, and Plaintiffs' affidavits in Plaintiffs' favor (*see Jenkins*, 853 F. Supp. 2d at 322), Ms. Luo and Ms. Huang have personal knowledge as to just three locations, and the hearsay concerning Mr. Yang implicates the alleged policies at the Queens locations of Fay Da Bakery only. While this is a sufficient showing that certain employees were similarly situated, the question is where the Court should draw the line between those Fay Da Bakery employees who were similarly situated and those who were not. Ultimately, despite the low burden on Plaintiffs, the record before the Court provides an insufficient basis to "extrapolate from these [bakeries] to other [Fay Da Bakery locations]." *Trinidad v. Pret A Manger (USA) Ltd.*, 962 F. Supp. 2d 545, 557 (S.D.N.Y. 2013).

The opinion in *Trinidad* is instructive.[9] There, three (of six total) plaintiffs who worked at ten of 33 stores operated in New York City and owned by subsidiaries of the Pret A Manger

on preliminary documents such as pleadings and affidavits, which necessarily contain unproven allegations").

[9] The Court finds *Trinidad* more persuasive than the case cited by Plaintiffs, *Rosario v. Valentine Ave. Discount Store, Co.*, 828 F. Supp. 2d 508 (E.D.N.Y. 2011). In *Rosario*, the Court was moved by the not insignificant level of detail provided by the plaintiffs about practices at seven different stores, in addition to admissions by the defendants about common ownership. *Id.* at 514-18; *see* 10-cv-5255 (ERK) (LB), Dkt. No. 20-6. By contrast, as discussed below, here and

parent corporation ("Pret") brought an FLSA action alleging, *inter alia*, failure to pay a proper overtime premium. *Trinidad*, 962 F. Supp. 2d at 549, 557. Judge Engelmayer found that these three employees' overtime claims were worthy of being conditionally certified, but grappled with determining the scope of the collective within which the employees would be sufficiently "similarly situated." *Id.* at 557-60. Judge Engelmayer described his method of analysis as follows:

> The Court takes the list of stores noted in each of the three plaintiffs' declarations as the starting point for its determination as to which Pret stores must provide notice of an overtime claim, and then considers whether there is a basis either to (1) extrapolate from these stores to other Pret stores, based on whether there are sufficient allegations of a common policy of violating overtime[ ] rules that extends to other stores, or (2) eliminate stores from this list, based on unacceptably tenuous allegations.

Id. at 557.

The Court in *Trinidad* found deficiencies in establishing both the consistency of the policy within the same store and the inference of a common policy across all stores. *Id.* at 558. Because the record failed, for example, to establish that the plaintiffs worked full time at certain locations or to include "specifics" about the plaintiffs' employment, Judge Engelmayer pared the ten stores to six for conditional certification purposes and declined to extrapolate the collective to the remaining Pret locations in New York City. *Id.* at 558-60.

A similar result makes sense here. As discussed above, for conditional certification purposes each Fay Da Bakery corporation is part of a single common employer, as if they were subsidiaries of a single parent. However, the threadbare allegations in the pleadings and limited

---

in *Trinidad*, the plaintiffs did not provide sufficient detail to merit the extrapolation of "similarly situated" employees to locations beyond those at which the plaintiffs worked. *See Trinidad*, 962 F. Supp. 2d at 558 ("Plaintiffs have not come close to alleging facts 'to support an inference [of] a uniform policy' of FLSA-violative overtime practices across *all* [of defendants'] stores in New York City.") (citation omitted) (emphasis in original).

statements in Ms. Luo's and Ms. Huang's affidavits, combined with the documentary evidence in the record, do not sufficiently "demonstrate[ ] across all locations a uniform policy" of taking unlawful meal credits or unlawfully withholding compensation for uniform maintenance or purchases. *See id.* at 558. Combined with the allegations in the pleadings and the documentary evidence in the record, the Court finds that Ms. Luo's affidavit sufficiently describes these unlawful policies at the 41-60 Main Street, 136-18 39th Avenue, and 46-15 Kissena Boulevard locations (*see* Luo Aff. ¶¶ 8-13), and Ms. Huang's affidavit sufficiently describes them at the 41-60 Main Street location (*see* Huang Aff. ¶¶ 6-11), leading to the conclusion that employees at those three locations are "similarly situated."[10]

However, I respectfully recommend that the Court decline to extrapolate the collective to any additional Fay Da Bakery locations. In addition to Ms. Luo and Ms. Huang naming each other, their affidavits identify four other employees who they say were subject to the same unlawful policies. But the assertions about these four employees lack sufficient detail to merit expanding the collective to other locations, even with the modest burden imposed at this stage: for three of the four employees, no specific place of employment is identified (*see* Luo Aff. ¶¶ 17-22); for the four employees, no time period of employment is identified (*see* Luo. Aff. ¶¶ 17-25); and for all employees (including Ms. Luo and Ms. Huang), the allegations are made in a vague, conclusory, and repetitive fashion and without much basis to support the allegation of common policies among all Fay Da Bakery locations (*compare* Luo Aff. ¶¶ 8-25 *with* Huang Aff. ¶¶ 6-16).[11]

---

[10] The Court notes, with some concern, that significant portions of these affidavits are practically identical. However, at this stage, the Court is more concerned with the lack of detail provided than with the degree of similarity between Ms. Luo's and Ms. Huang's affidavits. Furthermore, contrary to Defendants' contentions, the fact that no Chinese translations of the affidavits were filed does not affect the Court's ability to consider these documents: Plaintiffs swore that the documents were translated into their native language and there is no basis, besides rank speculation, to suspect that Plaintiffs did not understand what they signed or that Plaintiffs' counsel acted inappropriately. *See Cuzco v. Orion Builders, Inc.*, 477 F. Supp. 2d 628, 634 (S.D.N.Y. 2007) (finding that FLSA case could proceed despite plaintiff filing English declaration without Spanish translation).

Plaintiffs have simply not provided the Court with enough specifics to meet even the modest burden that they face at this juncture.[12] *See, e.g.*, *Sharma v. Burberry Ltd.*, 52 F. Supp. 3d 443, 458 (E.D.N.Y. 2014) ("[T]he Court finds that [a manager's] vague assertions in his declaration, coupled with his lack of knowledge of any pay violations at other New York stores, do not warrant a finding that [sales associates] at all New York stores are similarly situated to the

---

[11] The Court again notes with concern that the Amended Complaint and other filings contain myriad typographical and drafting errors. *See, e.g.*, Am. Compl. ¶ 90 ("Additionally, *McDonald's* policy and practice is not to compensate Plaintiffs and other *Crew Members* for time spent cleaning and pressing uniforms") (emphasis added); *id.* ¶¶ 85-91 (referring to "Crew Members"); *id.* ¶ 65 ("Defendants knowingly and willfully failed to pay *Plaintiff Yu his* lawfully earned *overtime compensation*") (emphasis added); Luo Aff. ¶¶ 24, 25 ("LU YANG was a baker at the Fay Da Bakery who worked at, all Fay Da Bakeries, at Forest Hill, Queens Hill and 39th Avenue Fay Da Bakery. . . . LU YANG became a substitute baker who worked rotating at all Fay Da Bakery stores in Queens"); *see also* Pl. Br. at 14 (seeking to have the notice period run from "November 4, 2012 to the present" when the proposed Notice of Pendency filed simultaneously sought to have the notice period run from June 23, 2012); Pl. Supp. Br. at 4 (discussing an irrelevant "bona fide executive" exemption and concluding, "Here, Defendants concede through its discovery responses that its relevant business practices were uniform amongst.. [*sic*]"). While at this stage the Court will not assess the credibility of Plaintiffs' statements, the sloppiness and drafting errors in Plaintiffs' filings undermine Plaintiffs' motion to some extent.

[12] Plaintiffs contend that Defendants' responses to interrogatories (*see* Dkt. No. 54-1) constitute admissions "that all locations, then operating, of Fay Da Bakery took $2.50 as meal credit from their employees from November 26, 2011 to November 10, 2014." *See* Pl. Supp. Br. at 2; *id.* at 4. This is inaccurate, because the interrogatories are not clear. The response to Interrogatory No. 1, in particular, is not as helpful as Plaintiffs claim. When asked to identify "each location, that was owned or operated by the Defendants, that had a meal deduction policy for employees put in place," Defendants responded, "None. Prior to November 10, 2014, some of the locations took a meal credit." *See* Dkt. No. 54-1 at 5; *see also id.* at 8-9 (providing a similar answer regarding uniform maintenance policies). The response offers no clear insight, and no other valid discovery response sheds light on this issue. Considering the lack of clarity and specificity in the interrogatory responses regarding locations, timing, and positions of employees affected, the Court cannot conclude based on these interrogatory responses that employees at any Fay Da Bakery locations beyond the three at which Ms. Luo and Ms. Huang worked are "similarly situated."

Plaintiffs."); *Lujan*, 2011 WL 317984, at *7, *8 (conditionally certifying collective in New York locations but not Florida locations of restaurant because of "no firsthand evidence of violations at the Florida restaurants during the limitations period," leaving plaintiffs to allege only that "they heard of 'the same things' happening at the Florida locations, but they do not specify which violations occurred at the various locations and how often they occurred"); *Monger v. Cactus Salon & Spa's LLC*, 2009 WL 1916386, at *2 (E.D.N.Y. July 6, 2009) (finding insufficient evidence to expand collective beyond one location of spa because the only evidence was that plaintiffs "believe" that the same policies applied at all locations, but "[t]hey offer no basis for this belief; they name no individuals at other salons who are similarly situated; and they provide no documentary evidence that policies are the same at different Cactus Salon locations.").[13]

---

[13] *See also, e.g.*, *Martin v. Sprint/United Mgmt. Co.*, 2016 WL 30334, at *12 (S.D.N.Y. Jan. 4, 2016) ("[T]he declarants provide testimony about the policies of only three . . . subcontractors . . . located in New York City. No declarant purports to have personal knowledge about the policies of other[s] . . . . The declarations thus fail to supply a basis on which the Court could infer a common FLSA-violative policy spanning all [subcontractors] that contract with Sprint") (citations omitted); *Reyes v. Nidaja, LLC*, 2015 WL 4622587, at *3 (S.D.N.Y. Aug. 3, 2015) (describing a "consensus" among courts "that where a plaintiff bases an assertion of a common policy on observations of coworkers or conversations with them, he must provide a minimum level of detail regarding the contents of those conversations or observations."); *Hamadou*, 915 F. Supp. 2d at 666-67 (conditionally certifying collective of employees at Queens and Bronx gas stations, but not others in the state because no evidence was provided about the additional locations, rendering the allegations "too thin to warrant certification across all 243 gas stations in the state. Courts have repeatedly denied conditional certification of a statewide class (or a nationwide class) where plaintiffs have alleged that a *de facto* unlawful policy exists, but have only presented facts pertinent to several locations in a particular region."); *Laroque v. Domino's Pizza, LLC*, 557 F. Supp. 2d 346, 355-56 (E.D.N.Y. 2008) (declining to extrapolate to all locations in Brooklyn because plaintiffs' "thin factual support" concerning "the situation of the employees of the Brooklyn [locations]" was either hearsay or based on one employee's statement beyond the limitations period about one Brooklyn location).

The other cases cited by Plaintiffs (*see* Pl. Supp. Br. at 6) are distinguishable. For example, the affidavits of the plaintiffs in some of the cases contained far more details about the employees and practices at other locations than Ms. Luo's and Ms. Huang's affidavits here. *See, e.g.*, *Yap v. Mooncake Foods, Inc.*, 146 F. Supp. 3d 552, 562 (S.D.N.Y. 2015) (affidavit depicted signature book for all locations containing false payment information); *Fasanelli*, 516 F. Supp. 2d at 320-22 (eight declarants alleged FLSA violations, eighteen plaintiffs opted in, and two

Therefore, I find that employees at the three Fay Da Bakery where Ms. Luo and Ms. Huang worked – at 41-60 Main Street, 136-18 39th Avenue, and 46-15 Kissena Boulevard – are similarly situated, but there has not been a sufficient showing to conclude that the employees at the other Fay Da Bakery locations are similarly situated as well.[14]

B. Notice of Pendency and Consent to Join

Plaintiffs also seek approval of the proposed Notice of Pendency form and a proposed Consent to Join form (*see* Dkt. No. 48-5 (the "Consent")). Plaintiffs request that the Notice of Pendency and the Consent be mailed to "[a]ll current and former non-exempt and non-managerial employees" of Fay Da Bakery from June 23, 2012 to the date of the relevant Order conditionally certifying the collective action. *See* Dkt. No. 48-6 ("Proposed Publication Order"), ¶ 1. Plaintiffs further request that, within 15 days of the entry of the appropriate Order, Defendants furnish a list in Excel format containing the names, last known address, last known telephone number, last known e-mail address, and dates of employment for all individuals who were employed by the Fay Da Bakery corporations during the period from June 23, 2012 to the date of the Order. *Id.* ¶ 3. Finally, Plaintiffs propose that the Notice of Pendency and Consent be

---

general managers supported the employees' claims). In other cases, there was a smaller number of locations at which the plaintiffs did not work and a greater portion of locations at which the declarants did work compared to the total number of locations sought to be included in the collective action. *See, e.g.*, *Capsolas v. Pasta Resources, Inc.*, 2011 WL 1770827, at *3-4 (S.D.N.Y. May 9, 2011) (conditionally certifying collective at eight restaurants when plaintiffs worked at five of them and faced uniform tip policy, thereby supporting the "reasonable inference that there was a uniform policy across the eight restaurants"); *Garcia v. Pancho Villa's of Huntington Vill., Inc.*, 678 F. Supp. 2d 89, 93-94 (E.D.N.Y. 2010) (conditionally certifying collective at all three locations when plaintiffs and opt-in plaintiffs worked at a combined two of the locations and plaintiffs knew employees who were similarly treated at the third location); *Fasanelli*, 516 F. Supp. 2d at 319 (lead plaintiff worked at five of six restaurant locations).

[14] This is not a determination on the overall merits of this case. "Plaintiffs, of course, remain at liberty to attempt to establish that [the corporate defendants], based on a joint-employer theory, [are] accountable for any FLSA violations that are found to have occurred." *Martin*, 2016 WL 30334, at *11 n.24 (citations omitted).

published in English and Chinese and be conspicuously posted at all Fay Da Bakery locations. *Id.* ¶¶ 4-5. The Notice of Pendency proposes a 90-day opt-in period for prospective plaintiffs. *See* Notice at 5.

Defendants make a number of objections to the proposed Notice of Pendency. Defendants contend, *inter alia*, that employees who made above the minimum wage should not be included; that the Court should reduce the notice period based on the statute of limitations and the inapplicability of equitable tolling; that the opt-in period should be shortened to 60 days; that certain personal information of employees should not be turned over to Plaintiffs; that publicly posted notice is without purpose, and the Notice of Pendency should be disseminated by mail only; and that signed Consent forms should not be returned to Plaintiffs' counsel. *See* Def. Opp. Br. at 13-19; Def. Supp. Opp. Br. at 6-8. Defendants also seek modifications to the Notice of Pendency and Consent so that language related to employees' immigration status should be moved or rewritten, so that additional information is provided to potential opt-in plaintiffs (or is at least available to them), and so that certain drafting or typographical errors are fixed. *See* Def. Opp. Br. at 17-19. The Court will address these objections in turn.

1. Scope of Employees in the Collective

Plaintiffs seek to include all current and former non-exempt, non-managerial employees in the collective action. *See* Notice at 2-3. Defendants argue that the collective "should not include any workers who earned more than minimum wage, as any alleged meal credits or uniform cleaning costs would not have brought their claims below the minimum wage and so no FLSA claim is available for these workers." *See* Def. Opp. Br. at 13. Defendants cite no authority for this proposition and are incorrect.

As discussed above, meal credits may only be taken when the meals are "customarily furnished," meaning that they are provided in accordance with federal and state law. *See* 29 U.S.C. § 203(m); 29 C.F.R. § 531.31. There are a number of ways that a meal credit can be taken unlawfully under New York or federal law, and they are not limited to situations where the meal credit reduces an employee's wages below the minimum wage. *E.g.*, 29 C.F.R. § 531.3(a) (meal credit's "reasonable cost" may not exceed "the actual cost to the employer" of the meal).

Therefore, there is no reason to limit the collective to employees who earned the minimum wage per hour. The collective should be composed of all non-exempt, non-managerial employees who worked at the three locations identified above.[15]

2. Notice Period

In the Notice of Pendency, Plaintiffs seek to include all employees who worked at a Fay Da Bakery location at any time since June 23, 2012, three years before this case was filed. *See* Notice at 3. In their original motion papers, Plaintiffs request that the collective include any employee who worked at a Fay Da Bakery location at any time from November 4, 2012 to the date of filing of this motion. *See* Pl. Br. at 14; Pl. Reply Br. at 6. In their supplemental briefs, Plaintiffs seek to include any employee who worked at a Fay Da Bakery location in the six years before the commencement of the lawsuit, since June 23, 2009. *See* Pl. Supp. Br. at 5-6; Pl. Supp. Reply Br. at 4-5. Defendants argue for a notice period of three years from the date of the Order granting conditional certification. *See* Def. Opp. Br. at 13; Def. Supp. Opp. Br. at 6-8.

The statute of limitations for an FLSA claim is two years, "except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. § 255(a). Plaintiffs allege willful violations in the Amended Complaint (*see, e.g.*, Am. Compl. ¶¶ 68, 143-146). There is no reason why a three-year period should not apply here. *See, e.g., Valerio*, 314 F.R.D. at 73-74 ("At the conditional certification stage, allegations of willful conduct are sufficient to apply the three-year statute of limitations for purposes of certifying the class.") (internal quotation marks and citations omitted).

---

[15] On the other hand, the uniform maintenance and purchasing claims would only be valid as to those employees who had their wages pushed below the minimum wage as a result.

Plaintiffs also allege state law claims with longer limitations periods. There is a split of authority concerning these situations, but courts in this District have previously held that only a three-year limitations period should be applied to the notice period:

> [T]he longest applicable limitations period to plaintiffs' FLSA claim is three years if willful violations are established. 29 U.S.C. § 255(a). Thus, any potential plaintiff whose claim is more than three years old has a state law claim only. In the absence of diversity and a claim for damages in excess of $75,000 (which seems unlikely), the Court would have no subject matter jurisdiction over claims that are more than three years old since such claims would be pure state law claims. There is no reason to provide an opt-in notice to a plaintiff whose claims could not be asserted in this Court.

Hanchard-James v. Brookdale Family Care Ctrs., 2012 WL 3288810, at *4 (E.D.N.Y. Aug. 9, 2012) (quoting *Sobczak v. AWL Indus., Inc.*, 540 F. Supp. 2d 354, 364 (E.D.N.Y. 2007)).

I agree that a three-year notice period should apply here. To avoid causing inefficiency by providing notice to potential opt-in plaintiffs with claims that may turn out to be time-barred or confusing employees about disparate claims with different statutes of limitation, it makes sense to limit notification to employees during the three-year period before the filing of the instant action. *Trinidad*, 962 F. Supp. 2d at 564; *see Perez v. De Domenico Pizza & Restaurant, Inc.*, 2016 WL 4702666, at *2 (E.D.N.Y. Sept. 6, 2016) ("In the absence of direction from the Second Circuit, the Court finds the reasoning supporting the use of the three-year notice period to be more persuasive [than that of the six-year notice period]. . . . As to potential plaintiffs who are time-barred from relief under the FLSA, there is no purpose in sending such employees a notice informing them that (1) there is a pending opt-in lawsuit, (2) they may not opt in, and (3) they may later receive another notice should their status change due to [Rule 23] class certification.") (internal quotation marks and citation omitted); *McBeth v. Gabrielli Truck Sales, Ltd.*, 768 F. Supp. 2d 396, 400 (E.D.N.Y. 2011) ("With respect to extending the notice period to six years, while [n]otice to all former employees, going back six years, has been authorized where plaintiffs seek relief under both the FLSA and the New York Labor Law, . . . the growing trend in this district appears to be limiting the notice period to three years.") (internal quotation marks and citations omitted).

Typically, the notice period is measured "from the date of the Court's order granting plaintiffs' motion for conditional certification, not from the filing of the complaint." *Immortal Rise*, 2012 WL 4369746, at *7 (citations omitted); *see Ritz v. Mike Rory Corp.*, 2013 WL 1799974, at *3 (E.D.N.Y. Apr. 30, 2013). When there are no extraordinary circumstances that could implicate equitable tolling, this approach is usually applied. *See Guzelgurgenli v. Prime Time Specials Inc.*, 883 F. Supp. 2d 340, 356-57 (E.D.N.Y. 2012).

However, a number of cases in this Circuit have found that at the time of conditional certification, the Court should err on the side of caution and set the time for notice using the date of the filing of the lawsuit. *E.g.*, *Valerio*, 314 F.R.D. at 74 ("[B]ecause equitable tolling issues often arise as to individual opt-in plaintiffs, courts frequently permit notice to be keyed to the three-year period prior to the filing of the complaint, with the understanding that challenges to the timeliness of individual plaintiffs' actions will be entertained at a later date.") (internal quotation marks and citations omitted); *Wang v. Empire State Auto Corp.*, 2015 WL 4603117, at *13 (E.D.N.Y. June 29, 2015) (without delving into the "future argument" of equitable tolling, setting notice period based on "the remedial purposes of the FLSA [being] best served by setting the time for both discovery and notice using the date of the filing of the Complaint"), *adopted by*, 2015 WL 4603117 (E.D.N.Y. July 29, 2015). Such an approach makes sense here, where equitable tolling issues are not yet ripe for the Court to address in any meaningful way. Accordingly, the Notice of Pendency should be directed to those potential opt-in plaintiffs who, at any time between June 23, 2012 and the date of the Order conditionally certifying the collective action, worked as non-exempt, non-managerial employees at the 41-60 Main Street, 136-18 39th Avenue, and 46-15 Kissena Boulevard locations of Fay Da Bakery. Any timeliness issues should be decided if and when they arise.

3. Length of Opt-in Period

Plaintiffs propose a 90-day opt-in period. *See* Notice at 5; Pl. Br. at 14; Pl. Reply Br. at 6. Defendants object, and request an opt-in period of 60 days or less. *See* Def. Opp. Br. at 15.

"Courts in this Circuit routinely restrict the opt-in period to 60 days." *Sharma*, 52 F. Supp. 3d at 465 (citations omitted); *see Wang*, 2015 WL 4603117, at *11-12 (recommending an opt-in period lasting the "standard sixty days"); *Immortal Rise*, 2012 WL 4369746, at *7 (sixty day period "common practice under the FLSA"). "Indeed, courts have rejected requests for 90 day opt-in periods absent special circumstances." *Cohan v. Columbia Sussex Mgmt., LLC*, 2013 WL 8367807, at *12 (E.D.N.Y. Sept. 19, 2013) (citations omitted); *see Whitehorn v. Wolfgang's Steakhouse, Inc.*, 767 F. Supp. 2d 445, 452 (S.D.N.Y. 2011) ("While some courts have granted up to 90 day opt-in periods, they generally do so where the period is agreed upon between the parties or special circumstances require an extended opt-in period.").

In this case, Plaintiffs have not attempted to explain why a 90-day opt-in period is necessary, let alone described any "special circumstances" to warrant such a lengthy period. *See Guzelgurgenli*, 883 F. Supp. 2d at 357 ("Generally, courts have held that a sixty (60)-day period is sufficient for the return of Consent Forms, particularly where, as here, the proposed class is relatively localized and not extremely large.") (internal quotation marks and citation omitted). Accordingly, I respectfully recommend that the Notice of Pendency be modified to require opt-in plaintiffs to consent to join the action within 60 days of the date of the Notice of Pendency.

4. Discovery of Employee Information

Plaintiffs request that, within 15 days of the entry of the Order conditionally certifying the collective action, Defendants furnish a list in Excel format containing the names, last known addresses, last known telephone numbers, last known e-mail addresses, and dates of employment for all individuals who were employed by the Fay Da Bakery corporations during the notice period. *See* Proposed Publication Order ¶ 3.[16] Defendants contend that they should only be required to disclose the names and last known addresses of potential opt-in plaintiffs because of privacy concerns. *See* Def. Opp. Br. at 16.

"In general, it is appropriate for courts in collective actions to order the discovery of names, addresses, telephone numbers, email addresses, and dates of employment of potential collective members." *Valerio*, 314 F.R.D. at 74-75 (internal quotation marks and citations omitted); *Puglisi v. TD Bank, N.A.*, 998 F. Supp. 2d 95, 102 (E.D.N.Y. 2014) ("In regard to requests for names, last known addresses, telephone numbers (both home and mobile), e-mail addresses, and dates of employment, courts often grant this kind of request in connection with a conditional certification of an FLSA collective action.") (internal quotation marks and citations omitted); *see also Cherif v. Sameday Delivery Corp.*, 2015 WL 5772012, at *6 (E.D.N.Y. Sept. 30, 2015); *Wang*, 2015 WL 4603117, at *14.

---

[16] Confusingly and, again, likely due to sloppiness and drafting errors, Plaintiffs in their briefs suggest that they also seek information such as "Social Security numbers" and "alternate" phone numbers and addresses. *See* Pl. Br. at 2, 15. Plaintiffs apparently have withdrawn their request for employees' Social Security numbers (*see* Pl. Reply. Br. at 8), which would be inappropriate in this situation. *See Schear v. Food Scope Am., Inc.*, 297 F.R.D. 114, 129-30 (S.D.N.Y. 2014) (concluding that privacy concerns typically preclude discovery of Social Security numbers unless plaintiffs demonstrate that other contact information is insufficient to effectuate notice). I recommend that if Plaintiffs are unable to locate specific potential opt-in plaintiffs after obtaining the contact information from Defendants, Plaintiffs be free to renew their application for the discovery of Social Security numbers. *See Wang*, 2015 WL 4603117, at *16.

The Court sees no reason to depart from these cases. Defendants should be required to comply with Plaintiffs' "routine request for the names, mailing addresses, email addresses, and telephone numbers," so as to "assist in the provision of notice to these potential opt-in plaintiffs." *See Wang*, 2015 WL 4603117, at *15. Defendants should also provide the work locations and dates of employment of all potential collective members. *See Valerio*, 314 F.R.D. at 75.

This information should be furnished within 14 days of the entry of the Order conditionally certifying the collective action, and should be treated by the parties as confidential. To the extent that the parties have not entered into a Stipulation and Order of Confidentiality which includes this information, the parties should be ordered to do so. Finally, Defendants should produce this information in Excel format, if reasonably available, or else in Word format or in another standard electronic format.

5. Posting Notice

Plaintiffs seek to have the Notice of Pendency posted in conspicuous locations in both English and Chinese. *See* Pl. Br. at 14; Proposed Publication Order ¶ 4.[17] Defendants oppose this request and argue that "it serves no real purpose in this case" because of the mailed notice and because former employees will not be able to see the posted notice. *See* Def. Opp. Br. at 17.

---

[17] The Court disregards the reference to Spanish interpreting in the Proposed Publication Order as another drafting error. *See* Proposed Publication Order ¶ 4.

Courts routinely order notice to be posted in employee common areas, even if potential class members have been notified by mail. *Whitehorn*, 767 F. Supp. 2d at 449. "Posting the notice is a reasonable means of assuaging the vagaries of notice by mail, and would not unduly burden the defendants." *Wang*, 2015 WL 4603117, at *17 (internal quotation marks and citations omitted); *see Valerio*, 314 F.R.D. at 76 (ordering notice to be posted and mailed). The minimal burden of posting the Notice of Pendency (in addition to mailing it) in the three Fay Da Bakery locations – at 41-60 Main Street, 136-18 39th Avenue, and 46-15 Kissena Boulevard – should not dissuade the Court from ordering the Notice of Pendency to be posted there.

6. Return of Signed Consent Forms

Plaintiffs alternately request that the signed Consent forms be filed with the Clerk of the Court (*see* Notice at 4, 5) and be returned to Plaintiffs' counsel (*see* Notice at 5; Consent at 3). Defendants object to the sending of the signed Consent forms to Plaintiffs' counsel. *See* Def. Opp. Br. at 18.

Many courts in this District have concluded that requiring signed consent forms to be sent to plaintiffs' counsel "implicitly discourages opt-in plaintiffs from selecting other counsel," and therefore have modified proposed documents so that opt-in plaintiffs file their consent forms directly with the Court. *E.g.*, *Feng*, 2016 WL 1070813, at *6 (quoting *Lujan*, 2011 WL 317984, at *13-14); *Wang*, 2015 WL 4603117, at *19 (similar); *see Sharma*, 52 F. Supp. 3d at 462 ("The common practice in the Eastern District is to have opt-in plaintiffs send their consent forms to the Clerk of the Court rather than to plaintiffs' counsel.") (citations omitted); *Velasquez v. Digital Page, Inc.*, 2014 WL 2048425, at *14 (E.D.N.Y. May 19, 2014) (same). Therefore, I respectfully recommend that any opt-in plaintiffs be required to file their signed Consent forms with the Clerk of the Court rather than sending the forms to Plaintiffs' counsel. The Notice of Pendency and Consent forms should be revised to so reflect.

7. Language Regarding Undocumented Aliens

Defendants object to the bolded and italicized statement at the end of the Notice of Pendency informing employees that they "have a right to participate in this action" even if they are "undocumented alien[s] or if [they] were paid in cash." *See* Notice at 6. Defendants point to a 2012 case in this District with identical language in the identical location in the proposed notice (*see* 10-cv-5616 (FB) (ALC), Dkt. No. 22-4 at 3); in that case, the Court concluded that the statement's "size and placement . . . are unnecessarily inflammatory." *Enriquez v. Cherry Hill Mkt. Corp.*, 2012 WL 440691, at *4 (E.D.N.Y. Feb. 10, 2012). I agree. Plaintiffs should be required to strike that sentence and, on page 3 of the Notice of Pendency, in the paragraph beginning "You may be owed payment if you worked," Plaintiffs should add that potential plaintiffs may be owed payment even if they were paid in cash and regardless of their immigration status, or words to that effect. *See Enriquez*, 2012 WL 440691, at *4. Plaintiffs should be permitted to make this statement in bold typeface "to ensure that all potential plaintiffs are made fully aware of their rights in this action." *See Kemper v. Westbury Operating Corp.*, 2012 WL 4976122, at *5 (E.D.N.Y. Oct. 17, 2012).

8. Miscellaneous Issues Regarding Notice and Consent Forms

There are several other issues with the Notice of Pendency and Consent forms. They are discussed in turn, below.

First, consistent with the locations delineated above, I respectfully recommend that the Court direct the Notice of Pendency to be sent only to individuals employed at the 41-60 Main Street, 136-18 39th Avenue, and 46-15 Kissena Boulevard locations of Fay Da Bakery. *See*

Sharma, 52 F. Supp. 3d at 461. Therefore, the following paragraphs should only identify current and former employees since June 23, 2012 of those three locations (and the relevant Fay Da Bakery corporations): (i) on page 2 of the Notice of Pendency, the paragraph beginning, "TO: Current and former employees employed"; (ii) on page 3 of the Notice of Pendency, the paragraph beginning, "If you worked as for all locations [*sic*]"; (iii) on page 3 of the Notice of Pendency, the paragraph beginning, "THIS NOTICE is meant to advise you of your right to participate"; and (iv) on page 4 of the Notice of Pendency, the paragraph beginning, "If you worked as a delivery person."[18]

Next, the Notice of Pendency should be written to more clearly indicate that while the claims in this case implicate the minimum wage, this is not a typical case asserting minimum wage violations. I respectfully recommend that the Court should direct the parties to remove all current references to the minimum wage. If Plaintiffs wish to continue to refer to the minimum wage, I respectfully recommend that the Court direct such references to be rewritten to provide that the lawsuit is about alleged unlawful (rather than illegal) meal deduction and uniform maintenance and purchase policies, which may have resulted in employees receiving less than the minimum wage. *See* Notice at 3, 5.[19] This case is not about overtime pay (*see* Notice at 5), so I recommend that any statements about overtime be wholly stricken.

Furthermore, the bottom of page 4 inaccurately refers to a "delivery person" who may assert claims. As discussed above, potential opt-in plaintiffs include all non-managerial and non-

---

18 As discussed below, the reference to a "delivery person" must also be changed.

19 The Consent is similarly unacceptable. This case is not about "illegally retained tips" or "unlawful kickbacks." *See* Consent at 2. As with the Notice, the Consent should only reference the minimum wage to reflect that the lawsuit is about alleged unlawful meal deduction and uniform policies that could have caused employees to receive less than the minimum wage. Also, the relevant statute is of course the Fair Labor Standards Act. *Id.*

exempt current and former employees at the 41-60 Main Street, 136-18 39th Avenue, and 46-15 Kissena Boulevard locations of Fay Da Bakery.

Also, page 5 of the Notice of Pendency ("As a result of participating in this portion of the lawsuit . . .") identifies several obligations for potential opt-in plaintiffs, should they choose to opt-in. I respectfully recommend that the following language be added to the end of that paragraph: "If you choose to join this lawsuit, you will be bound by any ruling, settlement, or judgment entered in this case, whether favorable or unfavorable." *See Immortal Rise*, 2012 WL 4369746, at *8; *see Feng*, 2016 WL 1070813, at *6 ("The notice of pendency should include 'a neutral and non-technical reference to discovery obligations, to insure that opt-in plaintiffs understand that their participation would entail greater obligations than participation in some Rule 23 class actions.'") (quoting *Lujan*, 2011 WL 317984, at *11).

In addition, on page 6 of the Notice of Pendency, in the section titled "Filing the Consent to Joinder," I agree with Defendants (*see* Def. Opp. Br. at 18) that information about potential opt-in plaintiffs *not* opting in would be relevant. I respectfully recommend that this section now read:

> If you wish to participate in the portion of this lawsuit that seeks payments for allegedly unlawful meal credit deductions and/or uniform maintenance costs under the Fair Labor Standards Act, you must sign and return the enclosed Consent to Join form as directed below.
>
> If you do not wish to participate in this lawsuit, you need not do anything.
>
> If you do not sign and return the enclosed Consent to Join form as directed below, you will not be eligible to participate in the FLSA portion of this lawsuit, and will not be eligible to receive any benefits in the event that a settlement or

judgment is obtained. You will be free, however, to separately file and pursue your own claims against any of the defendants.

Consent to Join forms filed after [DATE] will be rejected unless good cause is shown for the delay.

If you wish to participate in this portion of the lawsuit, you must mail the enclosed Consent to Join form, postmarked by [DATE] to: [insert address for the Clerk of the Court]

See Enriquez, 2012 WL 440691, at *3.

Next, Defendants also request that information about Defendants and their counsel be included. In keeping with cases that have discussed this issue, I respectfully recommend that the second paragraph of page 6 of the Notice of Pendency be amended as follows:

[Name and contact information of Plaintiffs' counsel] represents the plaintiffs in this case.

[Name and contact information of Defendants' counsel] represents the defendants in this case. If you choose to join this case, you should not contact the defendants' lawyers directly yourself.

You will not be required to pay any fee for services provided by [Plaintiffs' counsel]. If you are represented by the plaintiffs' attorneys, their costs and fees will be paid out of any recovery against the defendants. You have a right to consult with an attorney about this matter. If you wish to be represented by other counsel, you may retain another attorney, but you will be responsible for paying that attorney.

> Further information about this Notice, the deadline for joining the lawsuit, or answer to other questions concerning this lawsuit may be obtained by contacting the plaintiffs' attorneys [Plaintiffs' counsel may restate their contact information or may reference their earlier information].

See Guzman v. VLM, Inc., 2007 WL 2994278, at *8 (E.D.N.Y. Oct. 11, 2007).

Finally, to minimize confusion, in both the Notice of Pendency and Consent, references to the Consent should be made to the correct name of the document – the Consent to Join – rather than "Consent to Joinder" or "Consent to Join Lawsuit."

IV. CONCLUSION

For the foregoing reasons, I respectfully recommend that the District Court issue an Order granting in part and denying in part Plaintiffs' motion for conditional certification. In particular, I respectfully recommend that the Court grant the motion as to the three locations where Plaintiffs Luo and Huang worked – at 41-60 Main Street, 136-18 39th Avenue, and 46-15 Kissena Boulevard – and deny the motion as to the other locations. I further recommend that the Court approve the Notice of Pendency and Consent forms as modified in accordance with this Report and Recommendation and direct that notice (i) be mailed to all current and former employees who worked at any of the three locations for which conditional certification has been granted at any time between June 23, 2012 and the date of the Order conditionally certifying the collective action, and (ii) be posted at the three locations for which conditional certification has been granted.

V. OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report and

Recommendation to file written objections. Failure to file timely objections shall constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See Marcella v. Capital Dist. Physicians' Health Plan, Inc.*, 293 F.3d 42, 46 (2d Cir. 2002); *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

SO ORDERED.

/s/
Steven L. Tiscione
United States Magistrate Judge
Eastern District of New York

Dated: Brooklyn, New York
November 23, 2016